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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners' Reply to Memorandum for the United States in Opposition to Petition for a Writ of Certiorari.

1. The judgment in the case at bar is in direct and irreconcilable conflict with a later case decided by the Ninth Circuit. *United States v. Henson,* .... F.2d .... (Ninth Circuit, No. 73-2063, October 5, 1973). In *Henson,* as in the case at bar, a jury convicted after being instructed pursuant to the *Roth-Memoirs* test. In vacating the judgment of conviction, the court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States,* 354 U.S. 476 (1957), and *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Thereafter,

on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which *some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless.*" (Emphasis added.)

After vacating the judgment of conviction, the court remanded the case to the district court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State*, ... Ind. ...., 300 N.E. 2d 100 (Aug. 21, 1973), and *Mohney v. State*, ... Ind. ...., 300 N.E. 2d 66 (Aug. 21, 1973). In *Stroud* and *Mohney*, the Indiana Supreme Court declared the Indiana obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.[1]

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[1]The Government, in seeking rehearing in *Henson*, with a suggestion for a rehearing en banc, states: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson*, 11). On December 3, 1973, the court made an order in *Henson*, deferring action on the Government's Petition for Rehearing With Suggestion for Rehearing En Banc, "pending the court's disposition of a number of cases now pending before the full court *en banc*, the disposition of which may affect the court's opinion in the subject case." One of the cases before the Ninth Circuit en banc is *United States v. London Press, Inc., et al.*, Nos. 72-2938 through 72-2942. This case involves issues virtually identical to those raised in the case at bar and, indeed, involves the identical brochure involved in the case at bar. It should be noted that no member of the panel which decided the case at bar is an active member of the Ninth Circuit. The case was argued on November 1, 1972 before a panel consisting of two retired Senior Circuit Judges (Barnes and Jertberg), and a retired Senior District Judge (East). The opinion was filed in the Office of the Clerk of the Court of Appeals for the Ninth Circuit on June 7, 1973. Judge Jertberg died on June 8, 1973, without having

More recently, on December 3, 1973, the Louisiana Supreme Court reached the conclusion that the Louisiana obscenity statute was unconstitutional in light of *Miller v. California*, 93 S.Ct. 2607. *Louisiana v. Shreveport News Agency, Inc.*, ... La. .... (Supreme Court of Louisiana, No. 53,985).

Still more recently, on December 11, 1973, the Tenth Circuit concluded that a guilty verdict returned by the jury pursuant to instructions given under the *Roth-Memoirs* test could not stand in light of *Miller*. *United States v. Friedman, et al.*, ... F.2d .... (10 Cir., No. 72-1143-44).

2. In response to petitioners' argument that the *Roth-Memoirs* test, as it existed prior to June 21, 1973, was unconstitutionally vague, the Government argues: "At no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional. See, *United States v. Thevis*, 484 F.2d 1149 (C.A. 5); *United States v. One Reel of Film*, 481 F.2d 206 (C.A.1)." (Memo. for the U.S., 3-4).

The cases cited by the Government suggest the necessity for a full review by this Court to determine whether the federal obscenity statutes were unconstitutional, at least prior to June 21, 1973. *United States v. One Reel of Film*, 481 F.2d 206 (1 Cir. 1973), was a civil importation case tried before a judge sitting without a

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affixed his signature to the opinion. The Los Angeles Times (June 9, 1973) reported that Judge Jertberg had been "hospitalized with cancer" a few months before his death. In light of Judge Jertberg's death, the denial of Petition for Rehearing herein was made solely by Circuit Judge Barnes and District Judge East. See, 28 U.S.C. §46(b).

jury. Prior to June 21, 1973, the judge found the film ("DEEP THROAT") obscene. The court of appeals affirmed. Addressing itself to the question of whether a national standard or a local standard applies in federal obscenity cases, the court said: ". . . While it is now clear . . . that a national community standard is not required in state prosecutions, *the Supreme Court's recent decisions leave unclear whether proceedings under federal statutes,* 'reaching . . . to all parts of the United States whose population reflects many different ethnic and cultural backgrounds,' *still require,* as was suggested in Manual Enterprises v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437, 8 L.Ed.2d 639 (1962), *reference to a 'national standard of decency.' See* Excellent Publications, Inc. v. United States, 309 F.2d 362, 365 (1st Cir. 1962). . . ." (481 F.2d at 208, n.2) (emphasis added). The court said that it did not read this Court "as requiring a local standard in proceedings under §1305(a). . . ." (*Id.*) Judge Coffin, concurring, added a few words "only to underscore the fact that we continue to apply 'national standards' in the judgment of this appeal, notwithstanding the reference to such by the Supreme Court in Miller v. California . . . as involving an 'exercise in futility' to define what is 'hypothetical and unascertainable'. We do so because of the nature of the federal statute . . . and because we see no other alternative if we are to participate meaningfully in the review process. . . . [W]ere we to remand for a ruling in accordance with Massachusetts-or-Boston standards, we as a reviewing panel would be two-thirds disabled in passing judgment on prurient appeal and patent offensiveness, for one of us is from Rhode Island and one from Maine. On the other hand, if our function is merely to see that the

proper law was applied—or, where there was jury, that the correct instructions were given—and once satisfied, to accept any ensuing finding, it could be said that such review was in name only, and certainly not the 'independent review' by an appellate court which is needed to safeguard First Amendment values. . . ." (481 F.2d at 210-211).[3]

United States v. Thevis, 484 F.2d 1149 (5 Cir. 1973), concluded that the relevant standard for a federal obscenity case is a local standard, not a nationwide one. The Fifth Circuit took the view that *Orito* and *12 200-Ft. Reels* incorporated the *Miller* standard, lock, stock and barrel, including "local" standards. The Fifth Court stated that it "might be noted that *Miller* relaxes the government's burden by eliminating the *Memoirs* requirement that the material be proven 'utterly without redeeming social value', and by the Court's clarification that '*community standards' does not refer to a nationwide community*. . . ." (484 F.2d at 1154) (emphasis added).

It thus appears that the First Circuit holds to the view that notwithstanding *Miller* a nationwide standard must be applied in federal obscenity cases, and that the Fifth Circuit is of the view that a local standard applies

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[3]In *United States v. One Reel of Film*, 401 F.2d 206, the court was of the view that "DEEP THROAT" offended national standards. This conclusion is highly questionable, in light of a number of jury trials involving this film. Juries found the film not obscene in Birmingham, New York, Jacksonville, Florida, and Miami, Florida. A trial in Los Angeles, California ended in a hung jury, 9-3 for acquittal. In Chicago, Illinois, a jury split 6-6. In Nashville, Tennessee, the vote was 7-5 in favor of the film. "DEEP THROAT" has played without interruption by the authorities in San Francisco for more than a year. In Los Angeles alone, approximately 500,000 adults paid to view the film while showing at a single theatre.

in federal cases.[3] This conflict between Circuits presents a substantial question requiring resolution by the Court.

3. The Government argues that *Miller* "does not indicate" that the utilization of a national standard "is unconstitutional" (Memo. for the U.S., 8).

In *Miller*, this Court observed that our Nation is too big and too diverse for the Court to be able to articulate "a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain material 'prurient', it would be unrealistic to require that the answer be based on some abstract formulation." (93 S.Ct. at 2618). To structure an obscenity prosecution around evidence of national community standards "would be an exercise in futility" (93 S.Ct. at 2618). The Court found nothing in the First Amendment that requires a jury to consider "*un-*

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[3]On December 12, 1973, the Honorable Bailey Brown, C.J., dismissed an obscenity indictment in the case of *United States v. Carter, et al.*, United States District Court for the Western District of Tennessee, Memphis Division, Cr. No. 72-207, on the ground, *inter alia*, that there is hopeless confusion as to whether national or local standards are to be used in a federal obscenity prosecution. In *United States v. Bloom, et al.*, United States District Court for the Western District of Virginia, Roanoke Division, No. 72-CR-35-R, the court denied a motion to dismiss an indictment brought under 18 U.S.C. §1461, saying, *inter alia*, that the relevant community was the judicial district in which the indictment was brought. Thereafter, on November 9, 1973, the court made an order stating:

> "The court is of the opinion that the rulings and orders this day entered herein involve controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the rulings and orders may materially advance the ultimate determinations of this action, pursuant to the provisions of Title 28, USC sec. 1292(b), an interlocutory appeal is granted."

ascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." (93 S.Ct. at 2619) (emphasis added). The Court cited with approval Chief Justice Warren's observation in *Jacobellis v. Ohio*, 378 U.S.184, 200, "that there is no provable 'national standard'. . . . [I]n all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It thus appears that the Government is in error when it argues that "[a]t no point did this Court in its obscenity decisions indicate that its clarification and modification of the *Roth* and *Memoirs* standards were required because those standards were unconstitutional" (Memo. for the U.S., 3). A standard that is "unascertainable", "hypothetical", "unprovable" and "abstract" is, it is respectfully submitted, vague. This would be so even in an ordinary criminal statute. It is *a fortiori* so where, as here, we touch upon First Amendment rights.

4. The Government is also in error when it argues that the rejection by this Court of the *Memoirs* three-pronged test, particularly the "utterly without redeeming social value" test, was solely to make obscenity convictions easier and had nothing to do with the vagueness of the *Roth-Memoirs* three-pronged test. In *Miller*, this Court spoke of the "intractable obscenity problem". Quoting Justice Harlan, Chief Justice Burger wondered if the "utterly without redeemng social value" test "had any meaning at all". The Court pointed to the "variety of views among the members of the Court unmatched in any other course of constitutional adjudication". Noting that because there was no majority

view, the Court "was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment". The Court noted that this procedure had cast it in the role of an unreviewable board of censorship, *subjectively* judging each piece of material brought before the Court. The *Memoirs* test, the Court concluded, "has been abandoned as *unworkable* by its author, and no member of the Court today supports the *Memoirs* formulation." (93 S.Ct. at 2610, 2613, 2614) (emphasis added).

It was in light of the above that the Ninth Circuit concluded, in *United States v. Henson*, ... F.2d .... (No. 73-2063, October 5, 1973), that the discarded *Memoirs* test of obscenity was "vague, ambiguous and essentially meaningless".

5. The Government has failed to comment on the *ex post facto* problems that emerge from its attempt to save §1461 by reading into it, retroactively, the specifically defined sexual conduct which is absent from §1461. In *Miller*, the Court emphasized that a statute designed to regulate obscenity *must be carefully limited*. As a result, the Court confined the permissible scope of such regulations to works which depict or describe sexual conduct, which conduct "must be specifically defined by the applicable . . . law, as written or authoritatively construed". The authorative construction, of course, must have been made prior to the time the conduct in issue occurred. *Bouie v. City of Columbia*, 378 U.S.347; *Douglas v. Buder*, 93 S.Ct.2199.

United States v. Thevis, 484 F.2d 1149 (5 Cir. 1973), relied on by the Government, concluded that footnote 7 in *United States v. 102 Reels of Film*

corrected, *retroactively*, the constitutional deficiency of §1461. In *Louisiana v. Shreveport News Agency, Inc.*, ... La. .... (Supreme Court of Louisiana, No. 53-954), the court addressed itself to this issue. The Louisiana statute, like §1461, used the general terms "obscene, lewd, lascivious" etc. In concluding that the Louisiana statute was unconstitutional, Justice Barham, speaking for the court said:

> ". . . [I]t must be obvious even to laymen and surely to this Court, that [the Louisiana obscenity statute] does not meet the guidelines and standards set forth by the United States Supreme Court in Miller v. California.
>
> "We are urged by the State, however to take the two examples, which the Miller majority opinion suggests state legislatures might define for regulation of certain obscene materials, and to make them the obscenity statute for Louisiana. . . .
>
> "In United States v. 12 200 Ft. Reels of Super 8mm. Film . . . the Chief Justice . . . stated in Footnote 7, in pure obiter dictum, that the Supreme Court was prepared to construe 'obscene', 'lewd', 'lascivious', 'filthy', 'indecent', or 'immoral', for the purpose of reviewing the constitutionality of the federal statutes . . . as being limited to 'specific-hard-core' sexual conduct given as examples in Miller v. California. We are bound by the holdings of the United States Supreme Court. We are not bound by the passing remarks of the authors of the opinions from that Court. We are not of the opinion that we are endowed with the constitutional authority to re-draft Louisiana's obscenity statute. . . ." (Slip Opinion, 7-8).

Even if the language in *United States v. 12 Reels of Film*, 93 S.Ct.2665, Footnote 7, is more than "pure obiter dictum", it certainly did not purport to have any retroactive effect.

The question in the case at bar is not, as the Government suggests, whether the brochure comes within the examples of "specifically defined sexual conduct" set forth in *Miller* (Memo. for the U.S., 6-7). Rather, the question is whether the statute met constitutional requirements prior to June 21, 1973. As we have shown above, §1461 was constitutionally infirm prior to said date.

6. The Government argues that any constitutional infirmity which might have flowed from the fact that the jury was instructed to measure the material by a non-existent national standard was cured because the court of appeals made its own constitutional judgment and found the brochure obscene under both a national and local standard (Memo. for the U.S., 8). The Government has overlooked the importance this Court placed upon *the jury* in obscenity cases. It is for the jury in the first instance to determine whether a challenged publication offends the relevant standards and appeals to prurient interest. In the case at bar, the jury was instructed to utilize national standards in answering these questions. If the jury was engaged in a futile exercise in attempting to answer these questions, petitioners have been denied a fair trial. If, as the Government argues, the court of appeals found that the brochure offended local standards, the court made that finding in the total absence of any evidence in the record on that issue and in the absence of a jury finding to that effect. In their Petition for a Writ of

Certiorari, petitioners pointed out that their attempt to prove to the jury that the publication at issue did not offend local standards was excluded. At no time was the jury instructed that it could not find the material obscene unless it found that it offended "local" standards. In short, the Government seeks by this argument to deprive petitioners of the right to a fair jury trial on the issue of obscenity, a right which this Court repeatedly emphasized in its decisions of June 21, 1973.

7. The Petition for a Writ of Certiorari noted that the Indictment, as amplified by the Bill of Particulars, charged only that the material appealed to the prurient interest of the average person, but that the trial court instructed the jury that it was free to measure the publication by its appeal to the prurient interest of the average ordinary adult, "or by a clearly defined deviant group". Petitioners argued that the jury was thus left free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person. (Petition, 50-51). The Government responded irrelevantly, stating that if material "which appeals to the prurient interest of clearly defined sexually deviant groups can satisfy the prurient appeal test . . . it does not cease to be obscene when combined with material which appeals to the normal person's prurient interest" (Memo. for the U.S. 8-9).

In *Miller*, the Court stated: "As the Court made clear in *Mishkin* . . . the primary concern with requiring a jury to apply the standard of 'the average person . . .' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person. . . ." (93 S.Ct. at 2620). In *Mishkin v. New York*, 383 U.S. 502, 508, the Court stated

that where the material "is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group."

In the case at bar, the sole evidence was that the brochure was designed for, and exclusively disseminated to, the public at large, and not to any clearly defined deviant sexual group. The court of appeals acknowledged that the Indictment did not charge that the brochure was designed for, or primarily disseminated to, a clearly defined deviant sexual group. Accordingly, it was clear error for the trial court to instruct the jury that it was free to return a verdict of guilt even if the brochure did not appeal to the prurient interest of the average person.

8. Petitioners argued that §1461, as construed to eliminate guilty knowledge, was unconstitutional and that the Government failed to even prove that petitioners knew the contents of the brochure in question (Petition, 31-42). The Government responded to petitioner's ten-page argument with ten simple words: "Petitioners assert that the evidence was insufficient to prove scienter" (Memo. for the U.S., 8, n.12).

9. Petitioners argued that they were denied a fair trial because the trial court excluded an entire category of evidence, including publications found not obscene by this Court, following findings of obscenity by lower courts (Petition, 44-47). Again the Government's answer is brief, if not illuminating. In a footnote, the Government states: "Petitioners assert . . . that the trial court erroneously excluded from evidence allegedly

comparable pornographic[4] material" (Memo. for the U.S., 8, n.12).

10. Petitioners argued that they were entitled to a reversal by reason of the fact that the trial court violated Rule 30 of the Federal Rules of Criminal Procedure. Petitioners pointed out that the Tenth Circuit had specifically held that failure to comply with the provisions of Rule 30 is clear reversible error. *Hall v. United States*, 378 F.2d 349 (1967). (Petition, 47-49.) The Government was not bothered by the conflict between the Circuits and answered this point of the Petition as follows: "Petitioners assert . . . that the trial court committed reversible error by not allowing objections to jury instructions outside the presence of the jury" (Memo. for the U.S., 8, n.12).

11. The Government either totally ignored or failed to meaningfully discuss petitioners' argument that the brochure was not obscene; that the trial court erred in instructing the jury on pandering since pandering was not charged; that the prosecutor made misleading, biased, prejudiced and emotionally charged remarks to the Grand Jury with respect to the standards for judging obscenity; that the trial court erred in denying petitioners a short continuance which would have assured the presence of members of a cognizable class (of young people) in the jury pool; that the trial court erroneously refused to ask prospective jurors questions touching upon their background and religious attitudes to enable petitioners to exercise intelligently their peremptory challenges and challenges for cause.

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[4]The Government appears to be of the view that the publications found not obscene by this Court in *Burgin v. South Carolina*, 404 U.S.806 (which were offered in evidence) were pornographic.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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